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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LIONEL VALENZUELA PEREIDA, Appellant.	2 CA-CR 2009-0191 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800773

Honorable Donna M. Beumler, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt — Tucson
Attorneys for Appellee

Joel A. Larson, Cochise County Legal Defender — Bisbee
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Lionel Pereida was convicted of three counts of sexual assault and one count of sexual conduct with a minor. On appeal, Pereida

challenges his convictions, contending he was deprived of a fair trial by the prosecutor's misconduct. For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdicts. *State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In 2004, fifteen-year-old E. was living at her grandmother's house in Douglas with her grandmother; her uncle, Pereida; and two of Pereida's children.[1] That summer, while watching a movie with E. in her bedroom, Pereida touched her breasts, and, during another incident a few weeks later, Pereida forced E. to let him perform cunnilingus on her. In 2005, E. moved to Phoenix temporarily. After she returned to Douglas in either 2005 or 2006, Pereida again forced her to submit to cunnilingus.

¶3 In 2008, E. and her mother had moved back in with E.'s grandmother. Sometime between July 15 and August 15, Pereida told E. to come to his house, and she agreed because she "was scared he might hit [her]." He also previously had threatened to tamper with her car. When she arrived, Pereida told her to lie down on a mattress on the floor, where he then penetrated her vagina with his penis. At other times during this period, Pereida entered E.'s bedroom and locked the door; he then "touched [her] body" and committed acts of cunnilingus. Between September 1 and 21, while E.'s mother was hospitalized, Pereida was staying with E. and her younger brother because Pereida's

[1]E. testified that she was sixteen years old in the summer of 2004, but her birthdate is September 1, 1988.

house had no electricity. He went into E.'s bedroom, closed the door, and "against [her] will, put his penis inside [her] vagina."

¶4 On September 29, 2008, Pereida went into E.'s bedroom, woke her up, and asked her if she wanted to have sex. She told him no and asked him to leave her alone. He became angry, and they argued. She tried to push him away, but "he wouldn't stop" and "told [her] to let [him] just do it one more time." So that "he would leave [her] alone," E. "let him do it." They engaged in sexual intercourse, and he licked her vagina. The next day she reported the incidents to the police.

¶5 A grand jury indicted Pereida on three counts of sexual assault and one count of sexual conduct with a minor, and a jury found him guilty of all charges. The trial court sentenced him to consecutive, slightly mitigated prison terms of six years for each of the sexual assaults and a .75-year term for sexual conduct with a minor. This appeal followed.

Discussion

¶6 Pereida's sole contention on appeal is that "the prosecutor engaged in misconduct which resulted in the deprivation of a fair trial" in violation of his rights under "the Fifth and Fourteenth Amendments [to] the United States Constitution, as well as Article 2, Section 24 of the Arizona Constitution." He acknowledges that he did not raise this argument below. We therefore review his claim only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant

could not possibly have received a fair trial.'" *Id., quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden of showing both that the error was fundamental and that it caused him prejudice. *Id.* ¶¶ 19-20. For prosecutorial misconduct to qualify as fundamental error, the error must be "'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d 519, 529 (2008), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). Thus, to warrant reversal, the defendant must demonstrate the improper conduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191, *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see* U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 4.

¶7 "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . . .'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To determine whether a prosecutor's remarks were improper, a trial court should consider: (1) whether they called to the jurors' attention matters they would not be justified in considering in determining the verdict, and (2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks. *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000); *State v. Armstrong*, 208 Ariz. 345, ¶ 61, 93 P.3d 1061, 1073 (2004).

¶8 Pereida contends the testimony of all of the state's witnesses "was heavily punctuated with improper questioning, ranging from leading questions to irrelevant questions, to cumulative questions."[2] He also argues the prosecutor elicited improper vouching and hearsay evidence from the investigating officers and made improper arguments during closing. We address each of the alleged instances of misconduct below.

Ultimate-Issue Testimony

¶9 Pereida claims the prosecutor was guilty of misconduct by asking questions that called for improper opinion testimony on an ultimate issue of fact. The following exchange took place during direct examination of Officer Ivan Villaescusa, who had taken E.'s initial report of the assaults:

> [PROSECUTOR]: Do you recall what [E.] said to you?
>
> [VILLAESCUSA]: That . . . [Pereida] had forced her to have sexual intercourse, and that he had told her in the past that he would kill her if she refused.
>
> . . . .

[2]As the state points out, Pereida wholly fails to relate the case law he cites to the specific facts of this case and instead relies on conclusory statements in place of proper argument. He cites the legal standard for reviewing claims of prosecutorial misconduct and generally argues "[t]his trial, as set forth in the factual section of this appeal, was rife with improper leading questions, cumulative material, hearsay, and irrelevant material." But he cites no authority to support his claim that the alleged errors committed in this case rise to the level of reversible prosecutorial misconduct. Although in our discretion we address the merits of the issues he raises, counsel should not take this as an invitation to submit such minimally supported arguments to this court in the future. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include concise argument containing contentions, reasons therefor, and supporting citations of authority).

[PROSECUTOR]: But E[.] reported the conduct of [Pereida] was against her will. Correct?

[VILLAESCUSA]: Yes, sir.

[PROSECUTOR]: That it wasn't consensual?

[VILLAESCUSA]: Yes, sir.

Pereida contends the prosecutor's questions elicited "answers that were properly the province of the jury, specifically, that the actions described were without consent because they were against E[.]'s will." To the extent Pereida is arguing the prosecutor elicited the officer's opinion on an ultimate issue, we disagree. *See Fuenning v. Superior Court*, 139 Ariz. 590, 605, 680 P.2d 121, 136 (1983) (witness may not testify concerning defendant's guilt or innocence). Villaescusa did not give his opinion on the subject; he merely testified that E. had reported she had not consented to sexual activity with Pereida. Thus, this testimony did not amount to improper opinion evidence that invaded the jury's fact-finding function.

Inadmissible Hearsay

¶10 Pereida maintains that some of "[t]he testimony from . . . Villaescusa . . . consist[ed] of a series of questions that called for hearsay answers . . . and were improper attempts at introducing purportedly prior consistent statements." Specifically, he contends Villaescusa's testimony about what E. had told him when she reported the offenses was inadmissible hearsay. We agree that E.'s out-of-court statements, introduced through Villaescusa, were hearsay. *See State v. Tucker*, 165 Ariz. 340, 343, 798 P.2d 1349, 1352 (App. 1990) (prior consistent statements generally hearsay); Ariz.

R. Evid. 801(c). However, defense counsel never objected to this testimony, and "if hearsay evidence is admitted without objection, it becomes competent evidence admissible for all purposes." *State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982); *State v. Tafoya*, 104 Ariz. 424, 427, 454 P.2d 569, 572 (1969).

¶11 Although we nevertheless will reverse when we find fundamental error has resulted from the admission of hearsay evidence, *see McGann*, 132 Ariz. at 299, 645 P.2d at 814, we cannot say fundamental error occurred here. E. testified at trial and provided the facts necessary to establish all the elements of each count in the indictment. Thus, Villaescusa's testimony was not the "sole proof of an essential element of the state's case," nor did his testimony place before the jury evidence that was inadmissible. *Id.*; *see also State v. Allen*, 157 Ariz. 165, 171, 755 P.2d 1153, 1159 (1988) (hearsay evidence fundamental error when constitutes sole "evidence of the details of the crime").

Improper Vouching

¶12 During trial, the state called as a witness Detective Pio Damiano, who had interviewed E. during the police investigation. Pereida contends part of Damiano's testimony improperly vouched for E.'s credibility, "which is the province of the jury." Pereida points to the following exchange between the prosecutor and Damiano:

> [PROSECUTOR]: And you were present when E[.] testified in this trial, were you not?
>
> [DAMIANO]: Yes, I was.
>
> [PROSECUTOR]: You heard her response[s] to questions, both direct and cross?
>
> [DAMIANO]: Yes, I did.

> [PROSECUTOR]: In the course of your interviewing E[.], was she consistent today as she was when she told you about what happened to her body back on the 30th of September, 2008?
>
> [DAMIANO]: Yes, she was.

It is apparent that the prosecutor intended for the jury to draw the inference from this testimony that E. was credible because her trial testimony was consistent with her prior statement to police. However, contrary to Pereida's argument, Damiano did not give an opinion about E.'s credibility or testify that she was more credible because her testimony and initial statement were consistent. Furthermore, during cross-examination, defense counsel challenged the consistency of E.'s statements and extensively questioned Damiano about his "belief that E[.]'s testimony in court was consistent with what she told [him] when [he] interviewed her." Pereida therefore has not established that Damiano's testimony constituted fundamental error on this ground.[3]

¶13 At the end of the state's case-in-chief, when Damiano's testimony concluded, the trial court sua sponte admonished the prosecutor about asking leading questions and his demeanor toward the jury, as follows:

> You were asking leading questions left and right. If the defense was to object to every leading question that you have asked, they would be jumping up like jack-in-the-boxes. Not only are you asking leading questions of this witness, but

[3]Generally prior consistent statements are inadmissible hearsay. *Tucker*, 165 Ariz. at 343, 798 P.2d at 1352. However, Pereida is not challenging this exchange on hearsay grounds, nor did he raise such an objection below. We therefore find such an argument abandoned. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). And, in any event, as we have discussed, although evidence technically may violate a hearsay rule, if there is no objection at the time of admission, it is admissible substantively for all purposes. *McGann*, 132 Ariz. at 299, 645 P.2d at 814.

> when you're asking him a question, you are looking at the jury and you're making facial expressions towards them.
>
> Because of the dimensions of the courtroom, this is a small courtroom, you are only a foot or two from the jurors, and you are showing them transcripts, pointing to things during the witness's answer.
>
> Your questioning of [Detective Damiano] came very close to argument, rather than questioning, because of your demeanor towards the jury and the fact that you are facing the jury during a significant part of the time of your redirect. I'm going to ask you to not ask leading questions, and to direct your focus to the witness answering those questions.
>
> . . . .
>
> You appear to be making eye contact with them during his answers, and I'd ask you not to do that.

Pereida relies on the court's comments to support his claim that the prosecutor's questions were "heavily punctuated" with leading, irrelevant, and cumulative questions. The record supports both Pereida's contention and the court's finding that many of the prosecutor's questions were leading. And we defer to the court's observation that, given the prosecutor's demeanor and nonverbal communication to the jury, the questioning more closely resembled argument than proper direct examination. *See State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988) ("The trial court is in a better position to judge whether the prosecutor is unduly sarcastic, his tone of voice, facial expressions, and their effect on the jury, if any."). However, the fact that the prosecutor asked leading questions does not necessarily constitute reversible prosecutorial misconduct. "We do not reverse cases for mere technical errors when it appears substantial justice has been done." *State v. Jordan*, 80 Ariz. 193, 198, 294 P.2d 677, 681 (1956).

¶14 Pereida has not argued, let alone established, that the prosecutor's questioning brought improper matters to the jury's attention or prejudiced his case in any way. Indeed, Pereida did not object to any of the prosecutor's questions during the state's case-in-chief on the grounds they were leading, cumulative, or argumentative. *See State v. Hoffman*, 78 Ariz. 319, 325, 279 P.2d 898, 901 (1955) ("The purpose of an objection is to permit the trial court to rectify possible error, and to enable the opposition to obviate the objection if possible.") (citation omitted). Even after the trial court admonished the prosecutor, Pereida did not seek a mistrial or request other curative action. *See State v. Gonzales*, 105 Ariz. 434, 437, 466 P.2d 388, 391 (1970) ("Our refusal to reverse because of the prosecutor's remarks is further supported by defense counsel's failure to object to the remarks at the time they were made."); *see also Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) ("Counsel's failure to object to the comments, while not dispositive, is also relevant to a fundamental fairness assessment."). We therefore cannot say the prosecutor's questioning in this case rose to the level of the fundamental, prejudicial error necessary to reverse Pereida's convictions.

Closing Arguments

¶15 During closing arguments, the prosecutor made five statements that Pereida contends shifted the state's burden of proof to him. He made no objection to the first four: "There's no evidence that refutes what [E.] reported for age 16, 17, 18, and 19"; "There is nothing that contradicts [E.'s claim of force]"; "There's nothing to suggest [E.'s allegation when she was seventeen] didn't happen"; and "There's nothing before you that

refutes what E[.] said."[4] Later, the prosecutor asserted, "There is no evidence to disprove what E[.] has courageously—." Defense counsel interrupted with an objection, arguing the prosecutor's statement shifted the burden of proof, and the trial court sustained the objection. It then instructed the jurors that what the lawyers say is not evidence.

¶16 Generally, a prosecutor's comments "on a defendant's failure to present evidence to support his or her theory of the case [are] neither improper nor shift[] the burden of proof to the defendant so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify." *State v. Sarullo*, 219 Ariz. 431, ¶ 24, 199 P.3d 686, 692 (App. 2008). But here, where no physical evidence was available, the prosecutor's comments arguably did draw attention to the fact that Pereida did not testify on his own behalf. However, any error in these comments was cured by the trial court's instruction during the state's closing and its final instructions that Pereida was presumed innocent, that the jury must not let Pereida's choice not to testify affect its deliberations, that the state had an affirmative burden of proving guilt beyond a reasonable doubt, and that Pereida was not required to produce any evidence.[5]

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[4]Pereida also notes that, in closing argument, the state argued the case was about consent, made arguments "that would fall under [Rule] 404(c)[, Ariz. R. Evid.]," and "gave what amounted to an oral [Rule] 404(c) . . . instruction." But Pereida provides no argument about why these comments were improper or constituted prosecutorial misconduct. Therefore, to the extent he is attempting to argue error occurred based on these issues, we find the arguments waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellate briefs "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

[5]The final jury instructions are not part of the record on appeal. However, because both parties requested each of these instructions, we presume the trial court gave them.

Cumulative Error

¶17 Individual instances of prosecutorial misconduct may not warrant reversal standing alone. However, they "may nonetheless contribute to a finding of persistent and pervasive misconduct," *State v. Roque*, 213 Ariz. 193, ¶ 155, 141 P.3d 368, 403 (2006), which we will find requires reversal of a conviction when, cumulatively, the misconduct "affected the proceedings in such a way as to deny the defendant a fair trial." *Hughes*, 193 Ariz. 72, ¶ 32, 969 P.2d at 1192. Although, as we have noted, some persistent misconduct may have occurred during trial, Pereida has not established it was sufficiently prejudicial so as to deprive him of a fair trial. The misconduct of which he complains did not place improper matters before the jury or undermine his defense. We therefore cannot conclude that fundamental, prejudicial error occurred. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

Disposition

¶18 For the reasons stated above, we affirm Pereida's convictions.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

And Pereida has not argued the court failed to instruct the jury on the state's burden of proof.